

STATE OF MICHIGAN
COURT OF APPEALS

NICOLE HILL-HAYNES, assignee of SUZANNE
COMER and PATRICK LEE JACOBSON,

UNPUBLISHED
January 2, 2001

Plaintiff-Appellee,

v

AUTOMOBILE CLUB INSURANCE
ASSOCIATION,

No. 214768
Wayne Circuit Court
LC No. 97-733160-NI

Defendant-Appellant.

Before: Jansen, P.J., and Doctoroff and O'Connell, JJ.

PER CURIAM.

Defendant appeals as of right from an order granting summary disposition pursuant to MCR 2.116(C)(10) in favor of plaintiff Nicole Hill-Haynes and denying defendant's motion for summary disposition. We reverse and remand for entry of summary disposition in favor of defendant.

On September 30, 1995, Hill-Haynes was injured in an automobile accident that occurred in the city of Flint. Suzanne Comer was driving a vehicle (a van) owned by her then fiancé, Patrick Jacobson.¹ Apparently, Comer made a left turn at a traffic light and did not see Hill-Haynes' vehicle. Hill-Haynes, as the oncoming vehicle struck the van being driven by Comer. Citizens Insurance Company (Citizens) insured Jacobson's van and defendant insured Comer's separate vehicle.²

Hill-Haynes filed a third-party automobile negligence suit against Comer and Jacobson, and Citizens defended the suit. The suit was ultimately settled for \$100,000 and Citizens agreed

¹ Comer and Jacobson were married on December 8, 1995. Because the parties were not married at the time of the accident, this opinion will continue to refer to Suzanne Comer by her former name.

² Comer was the sole owner of this vehicle and she believed that she was driving an Oldsmobile Bravada at the time of the accident.

to pay \$50,000 (the limits of Jacobson's policy). Comer and Jacobson then assigned to Hill-Haynes the \$50,000 liability coverage that might be available under defendant's policy.

Hill-Haynes brought suit against defendant seeking payment of defendant's policy limits issued to Comer. Both parties filed motions for summary disposition. The issue in both motions was whether Comer was covered by her policy issued by defendant while driving Jacobson's van. The trial court denied defendant's motion for summary disposition and granted Hill-Haynes' motion for summary disposition finding that Comer was covered under the "other car" clause of the policy.

We review de novo a trial court's decision on a motion for summary disposition. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999). In evaluating a motion for summary disposition brought under MCR 2.116(C)(10), a court considers the affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, MCR 2.116(G)(5), in a light most favorable to the party opposing the motion. *Maiden, supra*, pp 119-120. Where the evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. MCR 2.116(C)(10), (G)(4); *Maiden, supra*, p 120.

The insurance policy provides coverage for an insured car, which is defined in the policy as:

- a. **YOUR CAR**, which is the vehicle described on the Declaration Certificate and identified by a specific Vehicle Reference Number, a **replacement**, a **temporary substitute** and a **trailer** owned by **you**; and
- b. **OTHER CAR**, which is any **car** or **trailer** that **you** or any resident of **your** household: does not own; does not lease for 31 days or more; or does not have furnished or available for frequent or regular use.

The liability coverage section similarly provides:

1. Subject to the Definitions, Exclusions, Conditions and Limits of Liability of this policy, **we** will pay damages for which an **insured person** is legally liable because of **bodily injury** or **property damage** arising out of the ownership, maintenance or use including the loading or unloading of the **INSURED CAR**. The **INSURED CAR** means: **YOUR CAR**, which is the vehicle described on the Declaration Certificate and identified by a specific Vehicle Reference Number, a **replacement**, a **temporary substitute** and a **trailer** owned by **you**; and an **OTHER CAR**, which is a **private passenger car**, **utility car** or **trailer** that **you** or any resident of **your** household: does not own; does not lease for 31 days or more; or does not have furnished or available for frequent or regular use.

The question in this case is whether the van driven by Comer constituted an "other car" as defined in the insurance policy such that she was covered for the vehicle collision with Hill-Haynes. The parties rely exclusively on Comer's deposition, which was taken on April 17, 1998.

At her deposition, Comer testified that she was living at 11532 Britton Road in Byron with Jacobson (at that time, her fiancé) and his four children at the time of the collision. She testified that the Britton Road address was her principal place of residence at the time and that she had been residing there for about three months. At that time, Comer did own a house, located at 11710 Schram Street in Grand Blanc, and had owned it for about eight years. No one was living at the Schram Street residence when she was residing at the Britton Road residence. Comer testified that she spent the majority of the time at the Britton Road residence, although there would be occasion when she would stay at the Schram Street residence.

With regard to the van, Comer testified that the van was owned exclusively by Jacobson and that the van was at the Britton Road residence on a regular basis for her use if she needed to use it. She did not need Jacobson's permission to use the van and she could use the van when she wanted. Comer did use her Oldsmobile Bravada on a day-to-day basis, such as going to and from work. On the day of the collision, Comer was living in at the Britton Road address and she was taking her daughter to work when the accident occurred. Comer's specific testimony was that, because she was living with Jacobson in Byron at the time, "whenever we did anything, we took the van."

In *Farm Bureau Mutual Ins Co of Michigan v Nikkel*, 460 Mich 558, 566; 596 NW2d 915 (1999), our Supreme Court held that the policy language at issue in that case³, which is very similar to the "other car" definition in the present case, was unambiguous and enforceable. Indeed, plaintiff does not argue that the policy language in the present case is ambiguous. The question is whether the evidence in the present case is undisputed such that either party is entitled to judgment as a matter of law concerning the "other car" coverage.

It is undisputed that Comer did not own the van and did not lease the van for 31 days or more; however, we are compelled to conclude that the van was furnished or available for frequent or regular use by Comer and, consequently, is not an "other car" as defined in the insurance policy such that Comer is covered by defendant for purposes of the collision with Hill-Haynes. Comer's deposition testimony, and there is no other evidence to refute it, was that she was living with Jacobson at his house at the time of the collision and that she did not need permission to use his van. She specifically testified that the van was at the residence on a regular basis for her use if she needed it and that she could use the van if she wanted to use it. Since Comer's deposition testimony is susceptible of only one interpretation, namely, that the van was furnished or available for her frequent or regular use, the van is not an "other car" as defined in Comer's insurance policy.

Accordingly, we conclude that the trial court erred in granting summary disposition in favor of plaintiff by finding that the van was an "other car" under the policy so that Comer would be covered. Because the evidence is conclusive that the van did not constitute an "other car"

³ The specific language was the definition of a "non-owned automobile" as "an automobile or trailer not owned by or furnished for the regular use of either the named insured or any relative, other than a temporary substitute automobile."

under the terms of the insurance policy, defendant is entitled to summary disposition as a matter of law.

Reversed and remanded for entry of summary disposition in favor of defendant.

/s/ Kathleen Jansen

/s/ Martin M. Doctoroff

/s/ Peter D. O'Connell